No. 15007

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BENMATT ORGANIZATION, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANT.

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Opinion Below.

The finding of fact and opinion of the District Court are reported in the record at pages 17 to 26. The opinion may also be found in 134 Fed. Supp. 511.

Jurisdiction.

This proceeding involves manufacturer's excise tax from November 1, 1947 through October 31, 1949, in the sum of $8,501.78, together with interest as provided by by law.[1] The taxpayer filed a complaint with the District

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[1]This is a companion case. The parties stipulated that Civil No. 15008, involving same issues, abide final judgment herein.

Court on July 7, 1954 [R. 1] under the provisions of Sections 1340 and 1346(a)(1) of 28 U. S. C. The judgment of the District Court was entered October 24, 1955 [R. 30-31]. Notice of appeal was filed on December 16, 1955 [R. 31].

Questions Presented.

I.

Whether license plate frames [Ex. 1-a], specifically designed and manufactured to advertise an automobile dealers' business and products, with the name of the dealers' business and products molded into them, are "automobile accessories," within the meaning of Section 3403 (c) of the 1939 Code and Section 316.55 of Treasury Regulation 46.

II.

Whether license plate frames [Exs. 1-b and 1-c], bearing the name of a city, state or plain, are "automobile accessories," within the meaning of Section 3403(c), of the 1939 Code and Section 316.55 of Treasury Regulation 46.

III.

Whether license plate frames [Ex. 1-a], specifically designed and manufactured to advertise an automobile dealer's business and products, with the name of the dealers business and products molded into them, represent the sale of labor and material, or the sale of such frames as "automobile accessories" within the meaning of Section 3403(c), of the 1939 Code and Section 316.55 of Treasury Regulation 46.

IV.

Whether license plate frames [Exs. 1-b and 1-c], bearing the name of a city, state or plain, not sued on in this proceeding, and the facts contained in Paragraph VIII of the stipulated facts were properly received in evidence.

V.

Whether the provisions of a statute levying taxes, in case of doubt, are to be construed in favor of the taxpayers or most strongly against the government.

Statutes and Regulations Involved.

The applicable statutes and Regulations are set forth in the Appendix.

Statement.

The taxpayer is the manufacturer of automobile license plate frames [Exs. 1-a, 1-b and 1-c]. Exhibit 1-a, is specifically designed and manufactured for automobile dealers, with the name and products of the dealer molded into them [R. 25, Par. X1]. Such frames are given to customers for "advertising" purposes and charged to "advertising or other expense" on the dealers' books and records [R. 24, Par. VI]. License plate frames, advertising the dealers' business, cannot be purchased from automobile supply stores. Exhibits 1-b and 1-c, received in evidence over plaintiff's objection, bearing the name of a city, a state or plain, can be purchased at automobile supply stores and are advertised by such stores as protecting and complimenting license plates [R. 25, par. XI].

Appellant did not file claims for refund with respect to the manufacturers' excise tax represented by Exhibits 1-b and 1-c, and those taxes are not involved in this proceeding. The reason is as follows: Exhibits 1-b and 1-c

are sold over the counter by automobile supply stores and the purchaser is the ultimate consumer [R. 25]. Plaintiff had no way of knowing who the ultimate consumer was, so as to secure the written consents, required by Section 3443(d) of the 1939 Code (now Section 6416 of the 1954 Code).

Summary of Argument.

License plate frames [Ex. 1-a] advertising the dealers' business are not included in the generic term "automobile accessories," within the meaning of statute and the Regulations; that such frames are specially designed and made to order for automobile dealers; that the dealer's name is molded into them; that they advertise and identify the dealer's business and products; that advertising is their principal and primary function; that such frames are "accessory" to the dealers' business and not the automobile and are "commonly and commercially" known as advertising devices; that such frames cannot be obtained from automobile supply stores, but only from auto dealers and the customer is not charged for them; that the cost of such frames are charged to "advertising or other expense" on the dealers' books and records; that such frames do not come within the statutory classification of "automobile accessories," either by name or descriptive phrase; that the question is essentially one of classification; that license plate frames are advertising devices; and that such frames cannot be identified as the thing or article Sections 3403(c) and 316.55 of Treasury Regulation 46 have taxed and do not fit into such classification.

License plate frames [Ex. 1-b and 1-e], bearing the name of a city or state or plain, are not "automobile accessories" within the meaning of the statute and the Regu-

ations; and that license plate frames, with or without advertising matter, are unrelated and extraneous to the operational and functional elements of an automobile, and therefore such frames are not "automobile accessories."

License plate frames, advertising the dealers' business and specifically made to order for the various dealers, *represent the sale of labor and material,* and not the sale of frames as "automobile accessories" within the meaning of Section 3403(c) and Section 316.55 of Regulation 46.

The District Court, over plaintiff's objection, improperly received in evidence Exhibits 1-b and 1-c and other evidence contained in Paragraph VIII of the stipulated facts that Auto Supply stores advertised and sold such frames as articles for the protection and adornment of automobile plates; that plaintiff did not file claims for refund for the excise taxes, represented by Exhibits 1-b and 1-c, and those taxes are not involved in this proceeding; that, therefore, Exhibits 1-b and 1-c and the other evidence mentioned above are incompetent, irrelevant, and immaterial to any issue in this proceeding. Plaintiff reserved the right to object to materiality and competency of the above evidence in the written stipulation of facts signed by the parties [R. 14, 29]. The District Court entered an order over-ruling appellant's objections on October 24, 1955 [R. 29].

The provisions of a statute levying taxes, in case of doubt, are to be construed, in favor of the taxpayer; and most strongly against the government.

ARGUMENT.

I.

License Plate Frames [Ex. 1-a] Advertising the Dealers' Business, Are Not "Automobile Accessories."

II.

License Plate Frames [Exs. 1-b and 1-c] Bearing the Name of a City or State or Plain Are Not "Automobile Accessories."

Points I and II will be discussed together for the sake of convenience. Plaintiff's purpose under these headings is twofold: to endeavor to persuade this Court that license plate frames, advertising the automobile dealers' business, are not "accessories" and at the same time to persuade the Court that license plate frames, without advertising matter are not "accessories." If license plate frames, without advertising matter, are not "accessories" because unrelated to the automobile's "utility," *a fortiori,* license plate frames, advertising the dealer's business, are not "accessories." However, the converse of this proposition does not follow as will be hereinafter pointed out. Appellant maintains that the license plate frames herein, with or without advertising matter, are not included in the generic term "automobile accessories."

The question is essentially one of classification and the test, is whether the article attempted to be taxed, can be identified, by name or descriptive phrase, as the article the statute has taxed. Considerable light is thrown upon the problem by a close study of the statute and the Regulation. Section 3403 (c) of the 1939 Code, enumerates by name six "articles" "which shall be considered parts or accessories" and which are "spark plugs, storage batteries, leaf-springs, coils, timers, and tire chains." These six

"articles" were deliberately placed in the statute as a guide and to aid in defining the generic term "automobile accessories" and constitute statutory examples or classification. Each named article serves an operational and functional need of an automobile. License plate frames, on the contrary, are not a necessary and component part of an automobile and serve no operational nor functional need, therefore, such frames are functionally unrelated and extraneous to the *six named articles* set out in the statute. This being the case, license plate frames cannot be identified as the "articles" the law has attempted to tax. Such frames, in short, are not comprehended by and responsive to the statutory classification. Significantly, Treasury Regulation 46, Section 316.55 pick up and repeat *the same six named* "articles" listed in Section 3403(c) of the statute, thereby emphasizing and adopting the examples and classification set out in the statute.

The District Court's opinion states that "the evidence in this case discloses that automobile license plate frames can be purchased at any automobile accessory store, *which in itself, indicates that classification by the trade.*" The Court has inadvertently misread the stipulation of facts. The stipulated facts show that only license plate frames [Ex. 1-b] bearing the name of a city or state, and Exhibit 1-c which is plain, can be purchased at automobile supply stores. Exhibit 1-a, sued on in this proceeding, advertising the dealer's business and products, cannot be purchased at automobile supply stores, and can only be obtained from automobile dealers. The error apparently caused the Court to incorrectly classify Exhibit 1-a, advertising the dealer's business, as "automobile accessories." This is borne out by the Court's statement above quoted, "which in itself, indicates that classification by the trade." Under the District Court's reasoning, the fact that *Exhibit*

1-a, advertising the dealer's business, is not sold by auto supply stores indicates that such frames *are not classified by the trade* as "automobile accessories" and are, therefore, not "automobile accessories" within the meaning of the act. If license plate frames, advertising the dealer's business, under the Court's theory, were so classified *by the trade,* they would be included in the stocks of the automobile supply stores, and sold to customers in the normal course of their business. Exhibit 1-a, advertising the dealer's business, is manufactured and sold to automobile dealers only, and not to the general public. This fact, based on the District Court's theory, stamps them as advertising devices and indicates quite clearly their classification in the trade as advertising devices or media.

The opinion below further states "the plaintiff has recognized that frames without the advertising matter inserted on the body of the frames are subject to the tax by paying the same and not seeking a refund." We respectfully disagree with this conclusion by the Court. The reason for not suing on the frames [Exs. 1-b and 1-c] without the advertising matter, adverted to hereinabove, was because of the plaintiff's inability to secure the written consent of the ultimate consumer as required by Section 3443(d) of the 1939 Code. Exhibits 1-b and 1-c are sold over the counter by the automobile supply stores and the purchaser is the ultimate consumer. The taxpayer had no way of knowing who the customer was so as to secure the written consent required by the statute. In the case of the license plate frames, Exhibit 1-a, advertising the automobile dealer's business, the dealer is the ultimate purchaser since he gives the frames to his customers. As a prerequisite to bringing this proceeding, the automobile dealers' written consents were secured [R. 7, Par. 10]. Exhibit A, attached to the complaint [R. 8],

shows that the taxpayer overpaid the tax by $98,747.04, yet written consents were obtained for only $38,205.64. As a practical matter, it was difficult to secure the written consents even from the automobile dealers. Actually, the task was impossible with respect to Exhibits 1-b and 1-c, because the ultimate consumer was unknown to the plaintiff.

The Court below cited *Masterbilt Products Corp. v. U. S. A.* (1942), 42 Fed. Supp. 294, in support of its view that license plate frames are "accessories." The taxpayer designed and sold automatic cigarette lighters and dispensers. The device when attached to an automobile enabled a smoker who was driving to obtain a lighted cigarette without taking his eyes off the road, thereby contributing to safe driving, but not essential to safe driving. The contrivance was advertised by the plaintiff as an automobile safety device, which, in fact, it was and substantially contributed to the "utility and use" of the automobile. The Court stated it contributed to safe driving because "it enabled the operator of a car to obtain a lighted cigarette without taking his eyes from the road"; thus, it appears that automatic cigarette lighters are safety devices that contribute to the functional needs and utility of an automobile, and thus may be readily distinguished from the license plate frames in the present case. In *Masterbilt Products Corp., supra,* the Court cited *Universal Battery Co. v. United States* (1953), 281 U. S. 580, 584, 50 S. Ct. 422, 423, 74 L. Ed. 1051, and quoted the *rule* from that case as follows:

> "It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles even though there has been some other use of the articles for which they are not so well adapted."

We maintain that the use of the phrase "primarily adapted" refers to some utility or functional need for the device on the automobile. In *Universal Battery Co. v. U. S., supra,* from which the above quotation was adopted, *the articles involved were storage batteries, gascolaters, parts to speedometers, and brackets and fittings for use as replacement parts for bumpers on automobiles.* Each article, above named, is basically integrated to the operational and functional needs of an automobile and to its utility. Each article is within the classification and class of articles, comprehended by Section 3403(c) and, therefore, clearly within the generic term "automobile accessory." An automobile operates just as well without license frames, so, obviously, such frames do not add to the machine's utility. The test, therefore, set out in the *Universal Battery Co.* case has not been met. (*White v. Aronson* (1937), 302 U. S. 16, 82 L. Ed. 20, 58 St. Ct. 97.) The rule of the *Universal Battery* case, must be construed in relation to its facts. When so construed, the language used, refers to articles that are functionally related to the machine's utility.

The Court below cited *Cuno Engineering Corp. v. United States* (1930), 43 F. 2d 259, in support of the view that each case depends upon the particular facts under consideration. We fully agree with this statement of the law by the District Court. However, it is interesting to note that the *Cuno* case, *supra,* involved the sale of electric cigar lighters, combination cigar lighters, and ash receivers, and the Court held that such articles were not "automobile accessories" subject to the manufacturer's excise tax act. At page 262, 263, the Court stated:

> "(1, 2) The installation of a cigar lighter and ash receiver is manifestly a convenience to smokers occupying an automobile. *It may or may not add to*

the ornamentation of a car. This is a matter of taste. The defendant asserts that 'Congress meant to tax articles used on or in connection with automobiles.' If so, the taxing statute has not been so construed by the Commissioner or the courts. Auburn Rubber Co. v. United States, 67 Ct. Cl. 49; Wells Mfg. Co. v. United States, 66 Ct. Cl. 283; Milwaukee Motor Products Co. v. United States, 66 Ct. Cl. 295. The Commissioner has not taxed flower holders, ash receivers, cardcases, toilet cases, vanity cases, baby cribs, or hammocks. *Obviously a clear distinction prevails, and was within the intent of the Revenue Act, between an extraneous article or device capable and designed for use as a matter of comfort or luxury to occupants of an automobile, and one so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine's utility.* The segregation essential to make depends upon the facts of each case. We have held so more than once. Edison Storage Battery Company v. U. S., 67 Ct. Cl. 543, decided May 6, 1929; Cracker Jack Co. v. U. S. 67 Ct. Cl. 89, decided February 4, 1929. Aside from the general commercial value of the devices here involved, *it is difficult to see how they in any wise prolong the life of a car, aid in its operation,* or *function to overcome any of the various difficulties attendant upon the car's operation, or the incidental inconveniences of automotive travel.* A box of safety or loose matches, a separate automatic cigar lighter and ash receiver, clearly constitute a substitute for the devices involved. The electric lighter takes the place of all these, and does no more than serve a personal convenience to the occupant of the car who desires and seeks its use. We think the devices are to be classified alongside flower holders, cardcases, etc., heretofore mentioned." (Emphasis supplied.)

It will be noted that the Court observed

> "obviously a clear distinction prevails and was within the intent of the Revenue Act, between an extraneous article or device capable and designed for use as a matter of comfort or luxury to occupants of an automobile, and one so intimately connected with its safe operation and functioning elements that it becomes a component part of the machine's utility."

Manifestly, license plate frames advertising the dealer's business and products or plain frames, are not so intimately connected with the operation of the automobile's functioning elements that it becomes a component part of the machine's "utility." Moreover, it is difficult to see how license plate frames "in anywise prolonged the life of a car, aid in its operation or function to overcome any of the various difficulties attendant upon the car's operation, or the incidental inconvenience of automotive travel, so as to be classified as "automobile accessories."

The Court below further stated "It is my view that the use of frames is so widely known that the Court can take judicial notice of *their utility and use, as well as their ornamentation* (Cadwalder v. Zeh (1894), 151 U. S. 171, 14 S. Ct. 288, 38 L. Ed. 115)" (Emphasis supplied). By the above statement and the use of the word "utility", the Court below properly recognizes that an article to be an "automobile accessory" must contribute to the operational and functional need of an automobile and must be a component part of the machine's "utility", which is precisely the appellant's position herein. The Court further states, it will take judicial notice that license plate frames have such "utility and use" on automobiles and cites *Cadwalder, supra,* in support of this view. We

respectfully submit that the *Cadwalder* case, *supra,* does not support the view that the Court can take judicial notice of the "utility and use as well as their ornamentation" of license plate frames on automobiles. The case involved the interpretation of the tariff act, and holds that, in the construction of the act, words used therein to designate particular kinds or class of goods (toys), the commercial meaning is to prevail, unless Congress has "clearly manifested a contrary intention", and that it is only when no commercial meaning is called for or proved that the common meaning of the word is to be adopted.

We have contended all along that license plate frames are extraneous to the operational and functional needs of an automobile. If the District Court may take judicial notice of "the utility and use" of the license plate frames on automobiles, this Court may take judicial notice of the fact that thousands of automobiles do not use or employ license plate frames. This factor alone clearly indicates the non-essential and extraneous character of license plate frames on cars, from the standpoint of "utility and use". Further, the evidence shows that license plate frames advertising the automobile dealer's business and products are "commercially known" as advertising devices. The frames are not sold to the general public in automobile supply stores, but the dealer gives such frames to their customers and charge the cost on their books as *"advertising or other expense"*. Thus, under *Cadwalder v. Zeh, supra,* automobile license plate frames, advertising the dealer's name and business, are commercially known in the trade as advertising devices. It is self-evident from the frames themselves that they are advertising devices and automobile dealers and the general public regard them as advertising devices. The general public knows that the only place such frames can be obtained is from an

automobile dealer. Frames, advertising the dealers' business are not handled by automobile supply stores.

The District Court further states, "To put the same more clearly, plaintiff contends that an accessory ceases to be an accessory when an advertising plate is affixed thereto." The Court erroneously assumes that appellant concedes that license plate frames [Exs. 1-b and 1-c], bearing the name of city or state or plain, are automobile accessories. Appellant does not so concede. In the case of Exhibits 1-b and 1-c, as above stated, we could not locate the ultimate consumer, which accounts for the fact that we did not file a claim for refund with respect to the articles represented by those exhibits. As pointed out above, appellant maintains that the plain frames have no operational or functional use on an automobile and, therefore, may not be classified as an "automobile accessory."

The District Court believes that an accessory does not cease to be an accessory because it bears advertising matter, and states: "Hub-caps would be exempt under the same theory." We respectfully submit, with all deference, to the District Court, that hub-caps are a necessary and, component part of an automobile and add to its utility. They keep the dirt and grime out of the axles, contribute to the safety of operation, and prolong the life of the car. The Court further illustrates its views by the statement "A package of matches continues to be a package of matches notwithstanding the package carries an advertisement" and "a license plate frame is a license plate frame whether it bears an advertisement or is plain. A rose by another name does not cease to be a rose." These quotations from the District Court's opinion are not believed pertinent to the situation herein and seems to have

resulted from the Court's erroneous assumption that the plaintiff conceded that *plain license frames* are "automobile accessories." Assuming *arguendo,* that license plate frames without the advertising matter, are "accessories", it does not follow that license plate frames, advertising the dealer's business and name, are, therefore, "automobile accessories." The addition of the advertising matter, under the circumstances herein, assuming the plain frames are "automobile accessories," qualifies and changes the character of such frames as "automobile accessories", and classifies them as advertising media or devices.

An analogous situation is found in the income tax law. For example, the Commissioner of Internal Revenue *allows a deduction* for the cost and maintenance of uniforms of: baseball players, bus drivers, firemen (city), jockeys, letter-carriers, surgeons, nurses, etc. Ordinarily, clothing represents non-deductible personal expenses. However, owing to the character of the uniforms and the use to which they are put, the Commissioner allows and the Courts have approved a deduction for cost and maintenance. (1956—C. C. H., Par. 1342.2646). The license plate frames, advertising the dealer's business, like the uniforms are in a different category and classification and are, therefore, not subject to the manufacturers excise tax.

The license plate frames, advertising the automobile dealer's business are given to their customers. The District Court states "whether the dealer-purchaser gives them to his customer or sells them is immaterial to any issue in this case." *Williams v. Harrison* (1940), 110 F. 2d 989, is cited in support of this view. This pronouncement does not seem to be sound when applied to the factual situation in the subject case. It is our position

that the license frames advertising the automobile dealer's business are purely advertising devices and are commercially known as such in the trade. The fact that such frames are given to customers and the cost charged as "advertising or other expense," is pertinent evidence in support of this theory and argument.

Appellant's position herein, that license plate frames, advertising the automobile dealer's business, are not "accessories," is supported by *Smith v. McDonald* (C. A. 3, 1954), 214 F. 2d 920, reversing 116 Fed. Supp. 158. Certiorari was not applied for. Briefly, the facts in the *McDonald* case, *supra,* may be summarized as follows: The plaintiff trading as Night-Lite Sign Co., manufactured an electric sign designed to be attached by suction cups to the tops of taxicabs to advertise the taxicab operators' business. The sign consisted of a lucite tube housing, lettered "taxi," "vacant," "yellow," "veteran," or as otherwise desired. The signs are illuminated by electrical bulbs in the lucite housing. Such signs were purchased only by taxicab operators.

Justice Kalodner wrote the opinion. He stated the legal question in the first sentence of his opinion as follows:

> "Is an electrical sign, designed to be attached to the top of taxicabs to advertise its wares, an automobile accessory within the meaning of Section 3403(c) of the Internal Revenue Code which imposes a 5% tax on automobile accessories?"

This is the precise question involved in the present case, that is, whether license plate frames advertising the automobile dealers' business are "accessories" within the meaning of Section 3403(c), Internal Revenue Code, and Section 316.55 of Treasury Regulation 46. The simi-

arity between the cases is patent from a statement of the questions. The applicable statute and regulations are set out in a footnote in the *McDonald* case. The same statute and regulations are involved in the present case.

In *McDonald, supra,* the court stated "Upon consideration of the issues, we are of the opinion that plaintiff's electrical signs are not accessories. The character and use of the signs on taxicabs is analogous to the character and use of taximeters on taxicabs." It will be noted that the Third Circuit precisely held that electric signs on taxicabs "are not accessories." The District Court, in the present case, commented on the *McDonald* case, *supra,* and stated "With this holding we have no quarrel, but fail to see its application to this case." It seems clear to us that the *McDonald* case is based upon the premise and precisely holds that electric signs on taxicabs are not "accessories." The fact that they are *analogous* to the character and use of taxicab meters on taxicabs is not important. The basic thing is that the Court found and held in *McDonald supra,* that the taxicab signs were not "accessories" within the meaning of Section 3403(c) and Section 316.55 of Treasury Regulation 46.

In *Smith v. McDonald, supra,* Justice Kalodner not only stated the question but further clarified the issue to be decided by clearly stating the contentions of the parties. We quote:

> "The sum of plaintiff's contention on this appeal is that 'advertising sign or device' is not included in the generic term 'automobile accessory'; that 'that which is an accessory is integrated in the thing to which it is accessory'; that his electric sign is *accessory* to the taxicab operator's *business and not to his cab.*

> "It is the Collector's position that Section 316.55 of Treasury Regulation 46, which pertains to Section 3403(c), properly specifies that any article which is designed to be attached to an automobile to add to its utility or ornamentation, or whose primary use is in connection with an automobile, is an 'accessory.' The Regulation, says the Collector is dispositive of the plaintiff's contention under *Universal Battery v. United States* (1930), 281 U. S. 580, 50 S. Ct. 422, 74 L. Ed. 1051."

In *McDonald, supra,* the government thought, as they do here, that *Universal Battery* case was dispositive of the issue.

Finally, the Court stated in *Smith v. McDonald, supra,* "It may be observed that the Treasury Department has held that emblems designed to be attached to automobiles to show membership in automobile clubs, societies, etc. *are not taxable as automobile parts or accessories,* S. T. 409-11-1, C. B. 285." (Emphasis supplied.) The Circuit Court's reference, in *Smith v. McDonald, supra,* to "emblems designed to be attached to automobiles to show membership in automobile clubs, societies, etc." sustains and confirms appellant's view, that license plate frames, advertising the automobile dealer's business are not "accessories". The Court makes this point crystal clear, by comparing such emblems to the electric taxicab signs involved in the *McDonald* case. Actually, license plate frames, designed and manufactured to advertise an automobile dealer's business, more nearly resemble "automobile emblems" than the "electric taxicab signs" in *McDonald, supra.*

Moreover, the license plate, itself, is not an "automobile accessory". Logically, therefore, on what theory could the

license frame surrounding the license plate be regarded as an "accessory." License plate frames are not required on automobiles by the State of California or any other state. Assume the state furnished the license frame along with the plate, yet the combination would not make the license frame an "automobile accessory." The State of California requires a license plate for the purpose of identifying the automobile and its owner. License plate frames, advertising the dealer's business, are in the same category. They merely identify the dealer and advertise his business. Such frames, therefore, may not be classified as "automobile accessories."

III.

License Plate Frames Specifically Designed and Manufactured to Advertise the Automobile Dealer's Business and Products Represent the Sale of Labor and Material, and Are Not Sales of Frames as "Automobile Accessories."

Our position under this point is supported by *Johnnie and Mack, Inc.* (D. C. Fla., 1954), 123 Fed. Supp. 400 (appeal not taken). The plaintiff made seat covers to individual orders, after selection of the fabric by the purchasers. The purchasers were individual owners, and new and used car dealers. The Court held, in these circumstances, that the sale of seat covers *were the sales of labor and material* and were not the sales of seat covers as "accessories", within the meaning of Section 3403(c) and Section 316.55 of Treasury Regulation 46. The Court further stated that this was true whether the seat covers were made to individual automobile owners, after selection of fabrics by the purchaser, and irrespective of whether the purchaser is an individual automobile owner, or is a new or used car dealer. The license plate frame,

in the present case, advertising the dealer's business were made to order for the various automobile dealers. They, therefore, are analogous to the seat covers in *Johnnie and Mack, Inc., supra,* and represent the sale of labor and material and are not the sales of license plate frames as "accessories" within the meaning of Section 3403(c) and the regulations.

Another similar case is *Bacon & Van Buskirk Glass Co. v. Lackenbill* (D. C. Ill., 1955), 55-1, U. S. T. C. Par. 49-124. (The government did not appeal. C. C. H. 1956, Vol. 5, p. 51.102.) The taxpayer is engaged in the retail glass business, cutting glass from large sheets as ordered by customers for installation in their windshields, doors, or ventilator wings of their automobiles. Plaintiff did not, at any time, cut any glass for installation and place same in stock for resale to any person or persons but only as ordered by customers. The Court held that plaintiff was not a manufacturer of automobile parts or accessories within the meaning of the law, Section 3403(c), and the Regulations. The license plate frames in the present case, advertising the dealer's business, are cut from large metal sheets as *specially ordered by various automobile dealers.* Such frames are not carried in stock for sale to any person or persons. In this respect, the factual situation in the present case is similar to *Johnnie and Mack, Inc., supra,* and *Bacon & Van Buskirk Glass Co., supra,* and requires a similar holding. Asserting a contrary view, see *Masao Hirasuno v. McKenney* (D. C. Hawaii, 1955), 135 Fed. Supp. 897.

IV.

License Plate Frames [Exs. 1-b and 1-c] Bearing the Names of a City, State or Plain, and the Facts Contained in Paragraph VIII of the Stipulated Facts, Were Improperly Received in Evidence.

Appellant did not file claims for refund for the manufacturer's excise taxes, represented by Exhibits 1-b and 1-c, and those taxes are not involved in this proceeding. Consequently, Exhibits 1-b and 1-c, and the other facts contained in Paragraph VIII of the stipulated facts [R. 15], are incompetent, irrelevant and immaterial to any issue in this proceeding. Appellant reserved the right in the written stipulation of facts to object to such evidence on the ground that it was incompetent, irrevelant and immaterial [R. 14]. The District Court entered an order over-ruling appellant's objection to that evidence on October 24, 1955 [R. 27, 29]. Appellant points out that the District Court's finding of facts and conclusions of law and judgment herein was based on the above incompetent evidence [Pars. VIII, IX, X and XI of Find. of Facts; R. 24, 25]. In these circumstances, Paragraphs VIII, IX, X and XI of the District Court's findings of fact are invalid because they are not supported by competent and material evidence.

V.

The Provisions of a Statute Levying Taxes, in Case of Doubt, Must Be Construed in Favor of the Taxpayer and Most Strongly Against the Government.

Finally, appellant is convinced, that the license plate frames, herein, with or without advertising matter, do not come within the meaning of Section 3403(c) and Section 316.55 of Treasury Regulation 46, either by name, classi-

fication or descriptive phrase, *White v. Aronson, supra.* Such frames cannot be identified by reference to the statute and the Regulations as the thing or article the statute has attempted to tax. Obviously, there is doubt whether the license plate frames herein fall within the examples or classification set out in the Act. In case of doubt, the provisions of a statute must be construed in favor of the taxpayer and most strongly against the government. The lower Court contrary to this salutary rule, has erroneously enlarged the scope of Section 3403(c) and Section 316.55 of Treasury Regulation 46, instead of restricting the meaning of "Automobile accessories" to the articles identifiable under said Act. This important rule of statutory construction may not be lightly disregarded.

In *Gould v. Gould* (1917), 245 U. S. 151, 62 L. Ed. 211, 38 S. Ct. 53, the Court stated:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. *In case of doubt they are construed most strongly against the government, and in favor of the citizen. United States v. Wigglesworth,* 2 Story, 369, Fed. Cas. No. 16,690; *American Net & Twine Co. v. Worthington,* 141 U. S. 468, 474, 35 L. Ed. 821, 824, 12 Sup. Ct. Rep. 55; Benziger v. United States, 192 U. S. 38, 55, 48 L. Ed. 331, 338, 24 Sup. Ct. Rep. 189." (Emphasis supplied.)

In *U. S. v. Merriam* (1923), 263 U. S. 179, 68 L. Ed. 240, 44 S. Ct. 69, the Court stated:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is

imposed, rather than with legal forms or expressions. *But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used.* If the words are doubtful, the doubt must be resolved against the government in favor of the taxpayer. *Gould v. Gould,* 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53." (Emphasis supplied.)

In *Charles Leich & Co. v. U. S.* (C. A. 7, 1954), 210 F. 2d 901, 907, the Court stated:

"The words of the statute are thus open to construction. 'If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.' *United States v. Merriam,* 263 U. S. 179, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240. And, as was stated by this court in *Durkee Famous Foods, Inc. v. Harrison,* 136 F. 2d 303, 307. 'Another rule often overlooked in construing a revenue statute is that in a doubtful situation the taxpayer is entitled to the benefit of the doubt.' See also: *United States v. Updike,* 281 U. S. 489, 496, 50 S. Ct. 367, 74 L. Ed. 984."

Conclusion.

For the foregoing reasons the decision entered below should be reversed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code:

"Sec. 3403 (a) (b) (c), 26 U. S. C. A. of the Internal Revenue Code of 1939 (now Sections 4061, 4062, and 4063 of the 1954 Internal Revenue Code, 26 U. S. C. A.).

"Sec. 3403. Tax on automobiles, etc.

"There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

"(a) Automobile truck chassis, automobile truck bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semi-trailer (including in each of the above cases parts or accessories therefor sold on or in connection there with or with the sale thereof), 2 per centum. A sale of an automobile truck shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(b) Other automobile chassis and bodies and motor cycles (including in each case parts of accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 3 per centum. A sale of an automobile shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

"(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. *For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf spring, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of,* any of the articles enumerated in subsection (a) or

(b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. * * *" (Emphasis supplied.)

Sec. 3443 Credits and Refunds (d) 26 U. S. C. A. of the Internal Revenue Code of 1939 (now Sections 6416(a) of the 1954 Code).

(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pusuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with the regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

* * * * * * * *

Treasury Regulations 46 (1940), Sec. 316.55 (restated Section Federal Tax Regulations (1954) at page 1132)

Sec. 316.55 Definition of Parts or Accessories

"(a) The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (1) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in connection with such vehicle or article whether or not

essential to its operation or use. However, such term does not include tires, inner tubes, or automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts of accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see §316.140.

"(b) The term 'Parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

(c) *Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains which are suitable for use on or in connection with, or as component parts of,* automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use. As amended T. D. 5099, 6 F. R. 6132; T. D. 5854, 16 F. R. 9465, Sept. 18, 1951." (Emphasis supplied.)